Public Service Company of Colorado *and* International Brotherhood of Electrical Workers, Local No. 111. Case 27-CA-16820-1

June 14, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

Pursuant to a charge filed on March 14, 2000, the General Counsel of the National Labor Relations Board issued a complaint on March 31, 2000, and an amended complaint on April 7, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 27-RC-7997. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the amended complaint.

On April 24, 2000, the General Counsel filed a Motion for Summary Judgment. On April 27, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis that the employees at issue are statutory supervisors and/or managers and are therefore ineligible for collective bargaining. In addition, the Respondent alleges that to the extent the Board's determinations in this case were based on *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999), that case incorrectly sets forth the law pursuant to the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Public Service Company of Colorado, a corporation with an office and place of business in Denver, Colorado, has been engaged as a public utility in the generation, transmission, distribution, and sale of electricity, and the distribution and sale of natural gas. The Respondent, in the course and conduct of its business operations, annually purchases and receives at its Colorado facilities goods materials, and services valued in excess of $50,000 directly from points and places outside the State of Colorado. The Respondent, in the course and conduct of its business operations, annually sells and ships from its Colorado facilities, goods, materials, and services valued in excess of $50,000 directly to other enterprises within the State of Colorado, which other enterprises are directly engaged in interstate commerce. The Respondent, in the course and conduct of its business operations annually derives gross revenues in excess of $250,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Since about 1946 and at all material times, the Union has been the designated exclusive collective-bargaining representative of unit employees employed in operating, production and maintenance classifications. Since 1989, the Union has represented employees in the distribution dispatcher classification. Since these dates, the Respondent has recognized the Union as the representative of these employees in a single unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is, as modified, effective from June 1, 1997, to May 31, 2003.

Following an election held on February 18, 2000, in which the Respondent's full-time and regular part-time employees in the classifications of transmission operator, senior transmission, operator, and senior systems operator voted on the issue of whether they wished to be represented by the Union as part of the existing operation, production, and maintenance unit, the Union was certified on February 29, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full and regular part-time operating, production, and maintenance employees, distribution dispatchers, including transmission operators, senior transmission operators, and senior systems operators employed by Respondent in the State of Colorado, but excluding professional employees, confidential employees, guards,

and supervisors as defined in the Act, and all other employees.

The Respondent's employees in the unit constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all times since February 29, 2000, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive collective-bargaining representative of the unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. Refusal to Bargain

Since March 1, 2000, the Union has requested the Respondent to bargain over the terms and conditions of employment with respect to the full-time and regular part-time employees in the classifications of transmission operator, senior transmission operator, and senior systems operator, and, since March 9, 2000, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after March 9, 2000, to bargain with the Union as the exclusive collective-bargaining representative of the full-time and regular part-time employees in the classifications of transmission operator, senior transmission operator, and senior systems operator, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union over the terms and conditions of employment with respect to the full-time and regular part-time employees in the classifications of transmission operator, senior transmission operator and senior systems operator, and, if an understanding is reached, to embody the understanding in a signed agreement.[1]

ORDER

The National Labor Relations Board orders that the Respondent, Public Service Company of Colorado, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the International Brotherhood of Electrical Workers, Local No. 111, as the exclusive bargaining representative of the full-time and regular part-time employees of the Respondent employed in the classifications of transmission operator, senior transmission operator, and senior systems operator in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the full-time and regular part-time employees of the Respondent in the classifications of transmission operator, senior transmission operator, and senior systems operator, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in Denver, Colorado, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 27 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 9, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2000

John C. Truesdale, Chairman

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The General Counsel has not specifically requested a remedy under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), and we find that such a remedy would be inappropriate in this case. See *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER BRAME, dissenting.

In the underlying representation proceeding, based on my dissenting opinion in *Mississippi Power & Light Co.*, 328 NLRB No. 146 (1999), I dissented from my colleagues' denial of the Respondent's request for review of the Regional Director's Decision and Direction of Election in which he rejected the Employer's contrary contention and found that the Employer's full-time and regular part-time transmission operators, senior transmission operators, and senior systems operators were employees and not statutory supervisors or managers. Accordingly, I dissent here from my colleagues' finding that the Employer violated Section 8(a)(5) and (1) of the Act in this proceeding.

Dated, Washington, D.C. June 14, 2000

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J. Robert Brame III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local No. 111 as the exclusive representative of our full-time and regular part-time employees employed in the classifications of transmission operator, senior transmission operator, and senior systems operator.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our full-time and regular part-time employees employed in the classifications of transmission operator, senior transmission operator, and senior systems operator, and, if an understanding is reached, embody the understanding in a signed agreement.

PUBLIC SERVICE COMPANY OF COLORADO